U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: July 30, 1990

CASE NO: 88-INA-416

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

TEL-KO ELECTRONICS, INC.
Employer

on behalf of

KIM JUNG EUI
Alien

Simon Tsang, Esquire
For the Employer

BEFORE: Brenner, Guill, Litt, Marcellino, Romano,
Silverman and Williams
Administrative Law Judges

NAHUM LITT
Chief Judge:

DECISION AND ORDER

This matter arises from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (1982). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26 (1988).[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the

[1] All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform such labor, and that the employment of the alien will not adversely affect the wages and working conditions of the United Stated workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in the Appeal File (A1-A98), and any written arguments of the parties. See §656.27(c).

Statement of the Case

On July 16, 1986, Employer, Tel-Ko Electronics, Inc., filed an application for labor certification on behalf of the Alien for the position of Electronic Engineer (A4-5). Employer listed requirements of a B.S. in Electronic Engineering, two years experience in the job offered, and knowledge of the Korean language (A4).

In the Notice of Findings (NOF), dated March 10, 1988, the CO proposed to deny certification because the foreign language requirement was unduly restrictive and had not been shown to arise out of business necessity (A19-20). The CO also required Employer to submit certain documentation supporting the necessity of the language requirement, such as the people the employee would deal with and the percentage of these people who do not speak English; the percentage of business which was dependent upon the use of Korean; and the percentage of time the employee would use Korean (A19).

Employer filed rebuttal on March 18, 1988 (A21-64). Employer explained that its business consisted of repairing, inspecting and servicing electronic appliances of suppliers located in Korea, most notably Gold Star, with whom Employer stated it has an extensive contract (A64). Due to this relationship with Korean companies, Employer stated that it is essential that a continuous line of communication remain open, via telephone conversation, written correspondence and status reports between Employer and Gold Star (Id.). Employer included with its rebuttal several examples of the type of reports the employee would be responsible for sending to Gold Star (Id.). These reports, other than certain technical terms and salutatory material, are written in Korean (A21-54).

Employer further stated in response to the CO's request for information that over 95 of the employee's time would be spent communicating in Korean. Finally, Employer referred to a January 21, 1987 letter to the state job service, in which it stated that over 95 of its suppliers and

employees are Korean and speak no English, and over 95 of its business is dependent on the use of Korean. (A64, 56-57).

In the Final Determination, dated April 1, 1988, the CO denied certification because Employer did not establish that the foreign language requirement arose from business necessity (A67-68). Specifically, the CO stated that Employer's rebuttal shows that its contact is with representatives of a U.S. based company (A67). The CO based this conclusion on the cover memo, written in English, to the submitted reports, which the CO acknowledged were written in Korean (Id.). The CO also stated that Employer did not explain why facility with English is so limited among its suppliers, although Employer had been expressly required in the NOF to supply such information (Id.).

Employer requested review of this denial on April 18, 1988, and a three-judge panel of this Board affirmed the denial in a decision issued July 19, 1989. On August 1, 1989, Employer filed a Petition for En Banc Review, which was granted in an Order dated October 25, 1989. On January 25, 1990, the Board, with four judges dissenting, affirmed the panel's affirmance of the CO's denial and reinstated the panel decision.

On February 16, 1990, Employer filed a Motion to Reconsider the January 25, 1990 affirmance of the panel decision.[2] We grant Employer's motion and reverse the Order reinstating the panel decision, the panel's affirmance and the CO's denial of certification.

Discussion and Conclusion

The CO denied certification in this case solely on the ground that Employer failed to show that the requirement of knowledge of Korean arose from business necessity. Under §656.21(b)(2), job requirements cannot include a requirement for a language other than English, unless such a requirement is documented as arising out of business necessity. This Board has held that in order to establish business necessity, an employer must demonstrate (1) that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and (2) that the requirements are essential to perform, in a reasonable manner, the job duties as described by the employer. Information Industries, Inc., 88 INA 82 (February 9, 1989) (en banc).

When applied to a foreign language requirement, the Information Industries business necessity test involves two basic issues. To satisfy the first prong of Information Industries, an

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[2] This motion was not received within the ten-day limit established in Lignomat USA, Ltd., 88 INA 276 (January 24, 1990), as the period within which such a motion must be filed. However, since the Order of the full Board affirming the panel decision in this case was issued just one day after the issuance of the Lignomat decision, it would be inequitable to hold Employer to the new limit in this case. Accordingly, we will entertain Employer's motion on the merits. We emphasize, however, the Board's intention of enforcing in future cases the ten-day rule set out in Lignomat.

employer must show that a significant portion of its business is performed in a foreign language or with foreign-speaking clients or employees. Cf., Coker's Pedigreed Seed Co., 88-INA-48 (April 19, 1988) (en banc); Construction and Investment Corp., dba Efficient Air, 88-INA-55 (April 24, 1989) (en banc). If a small portion of the employer's business involves persons speaking a foreign language, this may be insufficient to establish business necessity. Cf., Weidner's Corporation, 88-INA-97 (November 3, 1988) (en banc); Best Roofing Company, Inc., 88-INA-125 (December 20, 1988) (en banc). To satisfy the second prong of Information Industries, an employer must show that the employee's duties require communication or reading in a foreign language. See Sysco Intermountain Food Services, 88-INA-138 (May 31, 1988) (en banc); Felician College, 87-INA-553 (May 12, 1989) (en banc); Coker's Pedigreed Seed Co., supra.

In its rebuttal, Employer explained that its business almost exclusively involved dealings with Korean suppliers of electronic equipment, particularly Gold Star. The fact that the employee sought for this position would be interacting almost entirely with Korean-speaking suppliers, in order to serve those suppliers, establishes that the foreign language requirement bears a reasonable relationship to the job in the context of the Employer's business. Further, Employer referred in its rebuttal to a letter sent to the state job service, which stated that over 95 of its business is dependent on the use of Korean.

Since this job involves duties which require frequent interaction with suppliers, in order to perform these duties the applicant for the job must speak the suppliers' language.[3] Since Employer has established that 95 of its suppliers and employees are Korean, it is necessary that the applicant for Employer's position also speak Korean in order to perform the job duties. In fact, Employer states that the employee would speak Korean over 95 of the time he is on the job. When the job duties include or demand interaction with clients who only speak a foreign language, the second prong of business necessity under Information Industries is met.

Employer supported these assertions concerning the extent of the use of Korean by submitting sample reports which the applicant would be expected to draft. The reports are written almost entirely in Korean. Since these statements are reasonably specific and identify their bases, and these bases were not specifically challenged by the CO, they are sufficient to constitute

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[3] This present appeal is not a case where the fluency in a foreign language is a mere preference of the Employer's clients, such as E. G. Hutton & Co., Inc., 89-INA-120 (March 20, 1990). The Board has not directly addressed, en banc, whether the clients' preference to speak a foreign language could be sufficient to establish business necessity. Some panel decisions have indicated that an employer's clients' preference may establish business necessity. Cf., Alywa Computer Corp., 88-INA-218 (Sept. 21, 1989); Jung Gil Choi, C.P.A., 88-INA-254 (March 27, 1990). Other cases have stated that the clients' preference to communicate in a foreign language is insufficient, or have required the employer to show that its clients do not know English. Cf., Weidner's Corp., 88-INA-97 (Nov. 3, 1988) (en banc); Prestige Cars Corp., 88-INA-351 (July 17, 1989); E. G. Hutton & Co., Inc., supra. Thus, we do not reach the issue in the present case of whether a client's preference to speak a foreign language is sufficient to establish business necessity.

documentation. Gencorp, 87-INA-659 (January 13, 1988). Moreover, this documentation convincingly establishes that knowledge of the Korean language is essential to perform, in a reasonable manner, the job duties described by Employer.

Further, none of the bases relied on by the CO in the Final Determination are supported by the record. The CO stated that the cover memos to Employer's sample reports show they were sent to a U.S. company. Employer's insistence, however, that this "U.S. company" is really a branch of its Korean supplier Gold Star, is supported by the memos which are addressed "G.S.N.Y." The CO does not dispute that Gold Star is a Korean company, and the fact that this Korean company has a branch in New York does not necessarily mean that this office is staffed with English-speaking employees. In any event, Employer stated in its brief in support of review of the CO's denial that these reports initially sent to New York ultimately go to Gold Star's home office in Korea.

While the CO also pointed out that these cover memos were written in English, he acknowledged that the underlying substantive material was written in Korean. This Board has held that correspondence written in English can still support the business necessity of a foreign language. Construction and Investment Corp., supra. Whether a cover letter to these reports was written in English is therefore not dispositive of whether the foreign language requirement is justified by a business necessity.

Finally, the CO stated that Employer failed to specify why its suppliers were so limited in English. We find, however, that Employer specifically stated in its rebuttal that over 95 of its suppliers were Korean. Further, we find this to be a reasonable explanation of why these suppliers do not speak English.

Employer has documented that its requirement of knowledge of Korean arises out of business necessity. Moreover, the CO's reasons for concluding otherwise are not supported by the full record. Accordingly, the CO improperly denied certification.

ORDER

The Board's prior decision and order affirming the panel is REVERSED. The Certifying Officer shall GRANT labor certification.

At Washington, D.C.

For the Board

NAHUM LITT
Chief Administrative Law Judge

NL/TL/DS

In the Matter of Tel-Ko Electroncis, Inc., 88-INA-416
J. Romano, dissenting.

The original panel affirmance of certification denial (July 19, 1989) turned upon the question whether the C.O. rationally concluded, from the record evidence, that Employer's proffer of facts underlying its assertion of business necessity was sufficiently inconsistent to warrant denial. The panel ruled in favor of the C.O. on this score, sanctioning the C.O.'s entertainment of significant doubt and drawing of an adverse inference from evidentiary material showing some English correspondence to a New York entity, in contrast to Employer's insistence that all correspondence was in Korean and directed to Korean companies. As the burden of proving business necessity for the language requirement is, by regulation, squarely placed upon Employer, the panel, in effect, acknowledged and validated the C.O.'s posture of skepticism as appropriately derived correspondent to that regulatory placement of burden of proof.

The majority appears to turn this standard for review on its head by substituting the Board, for the C.O., as that authority to be convinced that Employer's assertions sufficiently jibe with the documentary evidence. The better view, in my opinion, would be for the Board to leave undisturbed the C.O.'s view, where, as here, defensibly arrived at, on such matters. In fact, the majority's overreach (intrusion into the C.O.'s deliberative sphere) here appears particularly unjustified in light of the very nearly facial inapplicability of Construction and Investment Corp.[1], along with its consideration of, and result-dependence upon, material (i.e., a statement in Employer's brief)[2] which constitutes neither evidence nor even timely submitted reviewable evidence.[3] Put another way, it appears that not only is the Board (inappropriately) made available to be so convinced, but perceptible as being especially conducive to such effort in this case.

Moreover, since the subject request for reconsideration was filed 22 days after the order sought to be reconsidered, I would dismiss on Lignomat USA, Ltd. time constraints, which, while newly imposed only one day[4] prior to such order to be reconsidered, are nonetheless binding upon the parties. The notion of excusing a party therefrom on "equitable" grounds is, in my view, nowhere supported in precedent or otherwise.

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[1] Where the C.O. used the "poorly constructed letters [written] in English" as a basis for his conclusion that the required foreign language ability was unnecessary-as against the C.O.'s use here of the cover memos written in English as a basis for his questioning of the truthfulness of Employer's assertion that all memos were written in Korean.

[2] The statement alleged that the subject reports sent to New Yor k ultimately were forwarded to Korea.

[3] 20 C.F.R. §656.26(b)(4), 27(c); In re University of Texas at San Antonio, 88-INA-71 (5/9/88).

[4] Employer, in fact, had 10 days, not one, from order entry to timely file its request for reconsideration.

In the Matter of Tel-Ko Electronics, Inc. 88-INA-416
J.R. Williams, dissenting:

I dissent in this matter but not on the basis of any particular deference which the Board owes to the C.O.'s factual findings. Rather, I do so on the basis of the deference which I believe that the Board owes to the factual findings of one of its panels.

Following the lead of other appellate bodies, e.g. the United States Circuit Courts of Appeal, we have announced the policy of permitting en banc review of panel decisions only in the limited instances (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. In other words, such review is intended strictly as a means of establishing and preserving a body of precedent cases interpreting the labor certification law and regulations. It is not meant as a means for employers to obtain a "second shot" at favorable factual findings. This is particularly so where, as here, the employer seeks to do so on the basis of evidence that it had not presented to the original panel. In my opinion, employers should not be given the message, which the majority broadcasts here, that "[i]f at once you don't succeed [on the facts], try, try again."

Business necessity for a foreign language requirement was not a novel issue before the panel in this case. The panel's decision did not constitute a departure from the legal precedents that the Board had established regarding this issue and I see no reason for the Board to have revisted the panel's factual findings.